IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 411 OF 2006.

Bharat Nivrutti Kinhale. ... Appellant.

Versus.

Anjanabai Krushna Kinhale & ors. ... Respondents.

Shri S.V.Sadavarte for the Appellant.

Shri V.P.Patil for the Respondents Nos.1 and 2.

CORAM : ABHAY S.OKA, J.

DATED : 2nd May, 2006.

P.C.:

1. Heard Shri Sadavarte for the Appellant and Shri V.P.Patil appearing for Respondents Nos.1 and 2. On the prayer made by the learned Advocate for the Appellant, the names of Respondents Nos.3 to 6 are permitted to be deleted. Amendment to be carried out within the period of six weeks.

2. The Second Appeal is admitted on the following substantial question of law:

> "Whether the Appeal preferred by the Respondents Nos.1 and 2 before the District Court was maintainable in law ?"

By consent of the learned Advocates appearing for the parties, the Second Appeal is forthwith taken up for final hearing.

3. The Respondents Nos.1 and 2 are holding a decree of partition passed in Regular Civil Suit No.143 of

1979. The Respondents Nos.1 and 2 filed execution application for execution of the said decree. The executing Court dismissed the execution Application. Being aggrieved by the order of dismissal of the execution Application, the Respondents Nos.1 and 2 preferred an appeal purporting to be an Appeal under section 96 of the Code of Civil Procedure, 1908 before the District Court.

4. Shri Patil, the learned Counsel appearing for the Respondents Nos.1 and 2 fairly stated that the said Appeal was not maintainable and in fact the Respondents Nos.1‘ and 2 ought to have adopted appropriate proceedings for challenging the order passed on the execution application.

5. In views of this submission, the impugned Judgment and Order passed by the first Appellate Court deserves to be quashed and set aside with liberty to the Respondents to adopt appropriate proceedings for challenging the impugned order. Hence the following order is passed:

i) The Second Appeal is partly allowed. The impugned Judgment and Order dated 29th October 2005 passed by the Appellate Court is quashed and set aside and Civil Appeal No.72 of 2004 stands dismissed.

ii) This order will not preclude the Respondents Nos.1 and 2 from adopting appropriate proceedings for challenging the order passed by the learned Civil Judge, Junior Division, Saswad below Exh.1 in Regular Darkhast No.9 of 1984.

iii) All questions on merits of the said order are expressly kept open.

iv) There will be no order as to costs.

Judge.